



## **DEPARTMENT OF THE INTERIOR**

### **Fish and Wildlife Service**

#### **50 CFR Part 17**

**[Docket Nos. FWS–R2–ES–2012–0064; FWS–R2–ES–2013–0027; 4500030113]**

**RIN 1018–AX74; RIN 1018–AZ49**

### **Endangered and Threatened Wildlife and Plants; Listing as Endangered and Threatened and Designation of Critical Habitat for Texas Golden Gladecress and Neches River Rose-mallow**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; reopening of comment period.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the public comment period on the September 11, 2012, proposed endangered status for

the Texas golden glade cress and threatened status for the Neches River rose-mallow under the Endangered Species Act of 1973, as amended (Act). We also announce the reopening of comment on the September 11, 2012, proposed designation of critical habitat for these species and the availability of a draft economic analysis of the proposed designation of critical habitat for both species as well as an amended required determinations section in the proposed rule. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed rule, the associated draft economic analysis, and the amended required determinations section. Comments previously submitted need not be resubmitted, as they will be fully considered in preparation of the final rule.

**DATES:** We will consider comments received or postmarked on or before **INSERT DATE 30 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION**].

Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** section, below) must be received by 11:59 p.m. Eastern Time on the closing date. Any comments that we receive after the closing date may not be considered in the final decision on this action.

*Public informational session and public hearing:* We will hold a public hearing on this proposed rule in Nacogdoches, Texas, on May 1, 2013, from 7 p.m. to 8:30 p.m. (see **ADDRESSES**), preceded by a public informational session beginning at 5:30 p.m.

## **ADDRESSES:**

*Document availability:* You may obtain copies of the proposed rule and draft economic analysis on the internet at <http://www.regulations.gov> at Docket No. FWS–R2–ES–2012–0064 and Docket No. FWS–R2–ES–2013–0027, respectively. You may also request by mail from the Corpus Christi Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

*Comment submission:* You may submit written comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal:

<http://www.regulations.gov>. Submit comments on the listing proposal to Docket No. FWS–R2–ES–2012–0064, and submit comments on the critical habitat proposal and associated draft economic analysis to Docket No. FWS–R2–ES–2013–0027. See SUPPLEMENTARY INFORMATION for an explanation of the two dockets.

(2) *By hard copy:* Submit comment on the listing proposal by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R2–ES–2012–0064; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203. Submit comments on the critical habitat proposal and draft economic analysis by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R2–ES–2013–0027; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS

2042–PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the **Public Comments** section below for more information).

*Public informational session and public hearing:* The public informational session and hearing (see DATES) will be held in the Kennedy Auditorium at Stephen F. Austin State University, 1906 Alumni Drive S., Nacogdoches, Texas. People needing reasonable accommodation in order to attend and participate in the public hearing should contact Field Supervisor, Corpus Christi Ecological Services Office, as soon as possible (see FOR FURTHER INFORMATION CONTACT).

**FOR FURTHER INFORMATION CONTACT:** Field Supervisor, U.S. Fish and Wildlife Service, Corpus Christi Ecological Services Field Office, 6300 Ocean Drive, Unit 5837, Corpus Christi, Texas, 78412–5837, by telephone 361–994–9005 or by facsimile 361–994–8262. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

## Public Comments

We are reopening the comment period for our proposed listing determination and proposed critical habitat designation for the Texas golden gladeceess (*Leavenworthia texana*) and Neches River rose-mallow (*Hibiscus dasycalyx*) that published in the **Federal Register** on September 11, 2012 (77 FR 55968). We are specifically seeking comments on the draft economic analysis, which is now available, for the critical habitat designation; see ADDRESSES.

We are also notifying the public that we will publish two separate rules for the final listing determination and the final critical habitat determination for these two East Texas plants. The final listing rule will publish under the existing docket number, FWS–R2–ES–2012–0064, and the final critical habitat designation will publish under docket number FWS–R2–ES–2013–0027.

We request that you provide comments specifically on our listing determination under the existing docket number FWS–R2–ES–2012–0064. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

- (1) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to these species and regulations that may be addressing those

threats.

(2) Additional information concerning the historical and current status, range, distribution, and population size of these species, including the locations of any additional populations of either species.

(3) Any information on the biological or ecological requirements of these species and ongoing conservation measures for the species and their habitats.

(4) Current or planned activities in the areas occupied by these species and possible impacts of these activities on these species.

We request that you provide comments specifically on the critical habitat determination and draft economic analysis under docket number FWS–R2–ES–2013–0027. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(5) The reasons why we should or should not designate habitat as “critical habitat” under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the glaucous-winged gull or the rose-mallow from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat is not

prudent.

(6) Specific information on:

(a) The amount and distribution of the gladeoress and the rose-mallow and their habitat;

(b) What areas, that were occupied at the time of listing (or are currently occupied) and that contain features essential to the conservation of the species, should be included in the designation and why;

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change; and

(d) What areas not occupied at the time of listing are essential for the conservation of the species and why.

(7) Land use designations and current or planned activities in the subject areas and the possible impacts of these designations or activities on both species and their proposed critical habitat.

(8) Information on the projected and reasonably likely impacts of climate change on these species and proposed critical habitat.

(9) Any foreseeable economic, national security, or other relevant impacts that

may result from designating any area that may be included in the final designation. We are particularly interested in any impacts on small entities, and the benefits of including or excluding areas from the proposed designation that are subject to these impacts.

(10) Information on the extent to which the description of economic impacts in the draft economic analysis is complete and accurate.

(11) The likelihood of adverse social reactions to the designation of critical habitat, as discussed in the draft economic analysis, and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

(12) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(13) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

If you submitted comments or information on the proposed rule (77 FR 55968)



during the initial comment period from September 11, 2012, to November 13, 2012, please do not resubmit them. We will incorporate them into the public record as part of this comment period, and we will fully consider them in the preparation of our final determination. On the basis of public comments, we may, during the development of our final determination, find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion.

You may submit your comments and materials concerning the proposed rule or draft economic analysis by one of the methods listed in the **ADDRESSES** section. We request that you send comments only by the methods described in the **ADDRESSES** section.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the website. We will post all hardcopy comments on <http://www.regulations.gov> as well. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used, will be available for public inspection on <http://www.regulations.gov> at Docket No. FWS–R2–ES–2012–0064 (for the proposed listing rule) and Docket No. FWS–R2–ES–

2013–0027 (for the proposed critical habitat designation and draft economic analysis), or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Corpus Christi, Texas, Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**). You may obtain copies of the proposed rule at Docket Number FWS–R2–ES–2012–0064 and the draft economic analysis at Docket Number FWS–R2–ES–2013–0027 on the Internet at <http://www.regulations.gov> or by mail from the Corpus Christi Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT** section).

## **Background**

For more information on previous Federal actions concerning the gladeceess and rose-mallow, refer to the proposed determination and designation of critical habitat published in the **Federal Register** on September 11, 2012 (77 FR 55968), which is available online at <http://www.regulations.gov> (at Docket Number FWS–R2–ES–2012–0064) or from the Corpus Christi Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

## *Previous Federal Actions*

On September 11, 2012, we published a proposed rule to list the gladeceess as endangered and designate critical habitat and to list the rose-mallow as threatened and

designate critical habitat (77 FR 55968). In that same rule, for the gladeceess, we proposed to designate approximately 1,353 acres (ac) (548 hectares (ha)) of critical habitat in 4 units located in Sabine and San Augustine Counties, Texas, as critical habitat. For the rose-mallow, we proposed to designate approximately 167 ac (67 ha) of critical habitat in 11 units located in Trinity, Houston, Cherokee, Nacogdoches, and Harrison Counties, Texas, as critical habitat. The September 11, 2012 listing and critical habitat proposal had a 60-day comment period, ending November 13, 2012. We will publish in the **Federal Register** a final listing and critical habitat designation for gladeceess and rose-mallow on or before September 11, 2013.

### *Critical Habitat*

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting critical habitat must consult with us on the effects of their proposed actions, under section

7(a)(2) of the Act.

### **Consideration of Impacts Under Section 4(b)(2) of the Act**

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided such exclusion will not result in the extinction of the species.

When considering the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus (activities conducted, funded, permitted, or authorized by Federal agencies), the educational benefits of mapping areas containing essential features that aid in the recovery of the listed species, and any benefits that may result from designation due to State or Federal laws that may apply to critical habitat.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation,

strengthening, or encouragement of partnerships; or implementation of a management plan. In the case of the gladeceess and the rose-mallow, the benefits of critical habitat include public awareness of the presence of either species and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for gladeceess and rose-mallow due to protection from adverse modification or destruction of critical habitat. In practice, situations with a Federal nexus exist primarily on Federal lands or for projects undertaken by Federal agencies. We have not proposed to exclude any areas from critical habitat. However, the final decision on whether to exclude any areas will be based on the best scientific data available at the time of the final designation, including information obtained during the comment period and information about the economic impact of designation. Accordingly, we have prepared a draft economic analysis concerning the proposed critical habitat designation, which is available for review and comment (see **ADDRESSES** section).

#### *Draft Economic Analysis*

The purpose of the draft economic analysis is to identify and analyze the potential economic impacts associated with the proposed critical habitat designation for the gladeceess and the rose-mallow. The draft economic analysis separates conservation measures into two distinct categories according to “without critical habitat” and “with critical habitat” scenarios. The “without critical habitat” scenario represents the baseline for the analysis, considering protections otherwise afforded to the gladeceess and the

rose-mallow (e.g., under the Federal listing and other Federal, State, and local regulations). The “with critical habitat” scenario describes the incremental impacts specifically due to designation of critical habitat for the species. In other words, these incremental conservation measures and associated economic impacts would not occur but for the designation. Conservation measures implemented under the baseline (without critical habitat) scenario are described qualitatively within the draft economic analysis, but economic impacts associated with these measures are not quantified. Economic impacts are only quantified for conservation measures implemented specifically due to the designation of critical habitat (i.e., incremental impacts). For a further description of the methodology of the analysis, see Chapter 2, “Framework of the Analysis,” of the draft economic analysis.

The draft economic analysis provides estimated costs of the foreseeable potential economic impacts of the proposed critical habitat designation for the glaucous-winged and the rose-mallow over the next 20 years, which was determined to be the appropriate period for analysis because limited planning information is available for most activities to forecast activity levels for projects beyond a 20-year timeframe. It identifies potential incremental costs as a result of the proposed critical habitat designation; these are those costs attributed to critical habitat over and above those baseline costs attributed to listing.

The draft economic analysis quantifies economic impacts of glaucous-winged and rose-mallow conservation efforts associated with the following categories of activity, if such

activities are Federally assisted or carried out: (1) Routine transportation projects, utility related activities, and oil and gas development; (2) land management; and (3) water management.

We do not anticipate recommending incremental conservation measures to avoid adverse modification of critical habitat over and above those recommended to avoid jeopardy of the species for the rose-mallow, and as such the economic analysis forecasts few incremental economic impacts as a result of administrative costs due to the designation of critical habitat for this species. A number of factors limit the extent to which the proposed critical habitat designation will result in incremental costs, including the fact that all the proposed habit is occupied by the species, the species' survival is so closely linked to the quality of their habitat, few actions being carried out in the area are subject to a Federal nexus, and a portion of the proposed habitat is currently managed for conservation. The total incremental costs of efforts resulting from section 7 consultations on the rose-mallow are approximately \$29,000 in present value terms and \$2,500 on an annualized basis, (assuming a seven percent discount rate over 20 years). Section 7 consultation costs for the rose-mallow are limited to administrative cost.

The designation of critical habitat for the gladeceess may result in direct incremental impacts beyond the additional administrative costs of considering adverse modification in a section 7 consultation because: (1) only in cases where the plant can be found will proposed projects affecting the habitat also affect the plant; and (2) modifications to projects in designated critical habitat may be undertaken due to the

critical habitat designation.

The total projected incremental costs of efforts resulting from section 7 consultations on the gladeless is approximately \$478,000 in present value terms and \$42,700 on an annualized basis (assuming a seven percent discount rate over a 20-year period). Total incremental cost associated with administrative effort is approximately \$116,000 and the total project modification costs are estimated to be \$362,000 in present value terms (assuming a seven percent discount rate over a 20-year period). The analysis estimates potential future impacts based on the historical rate of consultation on co-occurring listed species in areas proposed for critical habitat as discussed in Chapter 2 of the draft economic analysis.

As we stated earlier, we are soliciting data and comments from the public on the draft economic analysis, as well as all aspects of the proposed rule and our amended required determinations. We may revise the proposed rule or supporting documents to incorporate or address information we receive during the public comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

#### **Required Determinations—Amended**



In our September 11, 2012, proposed rule (77 FR 55968), we indicated that we would defer our determination of compliance with several statutes and executive orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the draft economic analysis. We have now made use of the draft economic analysis data to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 12630 (Takings), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), E.O. 13211 (Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), and the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951). However, based on the draft economic analysis data, we are amending our required determination concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

*Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a

regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. Based on our draft economic analysis of the proposed designation, we provide our analysis for determining whether the proposed rule would result in a significant economic impact on a substantial number of small entities. Based on comments we receive, we may revise this determination as part of our final rulemaking.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we

considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term “significant economic impact” is meant to apply to a typical small business firm’s business operations.

To determine if the proposed designation of critical habitat for the glaucous-winged gull or the rose-mallow would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities, such as: (1) Routine transportation projects, utility projects and associated activities, and oil and gas development, including interstate pipelines; (2) land management; and (3) water management. In order to determine whether it is appropriate for our agency to certify that this proposed rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat affects only activities conducted, funded, permitted, or authorized by Federal agencies. In areas where the glaucous-winged gull or the rose-mallow is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect the species. If we finalize this proposed critical habitat designation, consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In the draft economic analysis, we evaluated the potential economic effects on small entities resulting from implementation of conservation actions related to the proposed designation of critical habitat for the gladeceess and the rose-mallow. For the Neches River rose-mallow, we do not anticipate recommending incremental conservation measures to avoid adverse modification of critical habitat over and above those recommended to avoid jeopardy to the species, and as such the economic analysis forecasts few incremental economic impacts as a result of the designation of critical habitat for this species. Those incremental impacts forecasted are solely related to administrative costs for adverse modification analyses in section 7 consultations. We anticipate conducting approximately 3 formal and 13 informal consultations, considering the designation, for a total of 16 consultations over the next 20 years. For the Texas golden gladeceess, we anticipate incremental conservation actions related to administrative and project modification. We anticipate conducting approximately 23 potential section 7 consultations, 3 formal and 20 informal consultations, over the next 20 years.

We assume that these consultations have an equal probability of occurring at any time during the study's timeframe. These estimates are also considered conservative because we assume that all projects occur independently; that is, we assume separate consultations for each project. Based on the consultation history, most consultations are unlikely to involve a third party. Electric cooperatives may be considered independently

owned and operated establishments that are not dominant in their field, thus falling under protection of the RFA. As calculated in this analysis, however, the costs to these entities are *de minimis* and would not be expected to have significant impact. Consequently, no small entities are anticipated to incur costs as a result of the designation of critical habitat for Texas golden glade cress and Neches River rose-mallow. Please refer to the draft economic analysis of the proposed critical habitat designation for a more detailed discussion of potential economic impacts.

The Service's current understanding of recent case law is that Federal agencies are only required to evaluate the potential impacts of rulemaking on those entities directly regulated by the rulemaking; therefore, they are not required to evaluate the potential impacts to those entities not directly regulated. The designation of critical habitat for an endangered or threatened species only has a regulatory effect where a Federal action agency is involved in a particular action that may affect the designated critical habitat. Under these circumstances, only the Federal action agency is directly regulated by the designation, and, therefore, consistent with the Service's current interpretation of RFA and recent case law, the Service may limit its evaluation of the potential impacts to those identified for Federal action agencies. Under this interpretation, there is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated, such as small businesses. However, Executive Orders 12866 and 13563 direct Federal agencies to assess costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consequently, it is the current practice of the

Service to assess to the extent practicable these potential impacts, if sufficient data are available, whether or not this analysis is believed by the Service to be strictly required by the RFA. In other words, while the effects analysis required under the RFA is limited to entities directly regulated by the rulemaking, the effects analysis under the Act, consistent with the EO regulatory analysis requirements, can take into consideration impacts to both directly and indirectly impacted entities, where practicable and reasonable. We have attempted to address indirectly impacted entities, as well as directly impacted entities.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. Information for this analysis was gathered from the Small Business Administration, stakeholders, and the Service. For the above reasons and based on currently available information, we certify that, if promulgated, the proposed critical habitat designation for either species would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

## **Authors**

The primary authors of this notice are the staff members of the Corpus Christi, Texas, Ecological Services Office, Southwest Region, U.S. Fish and Wildlife Service.

## **Authority**

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Date: April 8, 2013

Rachel Jacobson

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks

~~[Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat  
for the Texas golden glade cress and Neches River rose mallow]~~

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